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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 638

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, DICK R. THOMAS, JOE CALABRESE and DAN CALABRESE dba CALABRESE TRUCKING, JOE CALABRESE and DAN CALABRESE as individuals, V. THOMAS, and THE VETERANS ADMINISTRATION OF THE UNITED STATES,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 636

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner.

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, DICK R. THOMAS, JOE CALABRESE and DAN CALABRESE, dba CALABRESE TRUCKING, JOE CALABRESE and DAN CALABRESE as individuals, Y. THOMAS, and THE VETERANS ADMINISTRATION OF THE UNITED STATES.
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner has asked this court to review an order of the California Industrial Accident Commission granting the lien claim of the Veterans Administration of the United States for medical, surgical and hospital treatment rendered to a veteran seriously injured in the course of his employment with a private employer.

Petitioner thereafter filed a Petition for Writ of Review in the District Court of Appeal which was denied without opinion on August 22, 1958.

Petitioner then filed a Petition for Hearing in the Supreme Court of the State of California, which was denied without opinion on October 15, 1958.

OPINION BELOW

The petitioner has correctly stated the history of the litigation herein.

JURISDICTION

The jurisdiction of this court is invoked by Petitioner under *28 U. S. C., Sec. 1257 (3).*

Respondent submits that there is no federal question whatsoever involved in this case.

In accordance with its regulations, the Veterans Administration of the United States filed a lien for expense incurred by it on behalf of an injured employee wrongfully denied medical care by the petitioner. This lien was granted under the applicable state statutes permitting such liens. These statutes have been interpreted in accordance with their plain meaning. This interpretation is in no way repugnant to the Constitution, treaties or laws of the United States, or with any applicable decision of this court. The interpretation placed on the applicable statutes is solely a state matter and within the exclusive province of the state courts.

QUESTION PRESENTED

May the California Industrial Accident Commission allow a lien filed by the Veterans Administration of the United States for medical and hospital expense

incurred by it on behalf of an injured employee-veteran?

STATUTES AND REGULATIONS INVOLVED

California Labor Code, Section 4600 provides in part as follows:

> "Medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

California Labor Code, Section 4903 provides in part as follows:

> "The commission may determine, and allow as a lien against any amount to be paid as compensation:
>
> * * * * *
>
> "(b) The reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 of Chapter 2 of Part 2 of this division." (Note: This includes Section 4600, quoted above.)

Other pertinent statutes and regulations have been quoted by the petitioner in the appendices to its petition.

STATEMENT

The applicant-veteran, Dick R. Thomas, sustained a serious injury arising out of and in the course of his employment. Petitioner, the workmen's compensa-

tion insurer for his employer, erroneously denied liability and refused to provide medical and hospital treatment as well as other compensation benefits. The applicant, therefore, was forced to seek aid from the Veterans Administration and received necessary medical treatment and hospital care at Veterans Administration hospitals at Fresno and Long Beach, California.

Prior to the first hearing in this matter, the Veterans Administration Hospital filed its lien claim to which the applicant-veteran had assented. (This was received and filed into evidence as a part of Applicant's Number 2 at the hearing held August 4, 1955. A certified copy of the lien claim complete with the "Employee's Consent to Allowance of Lien" is a part of the Praecipe prepared by Petitioner.) The lien claim was brought up to date periodically thereafter.

After the referee issued his Findings and Award (in which he found the injury to be compensable and in which the lien claim of the Veterans Administration was allowed) several parties petitioned for reconsideration by the commission. Thereafter, the commission issued its Decision After Reconsideration (Appendix C of petition, page v). The lien claim of the Veterans Administration was allowed in such decision.

Petitioner thereafter filed a Petition for Writ of Review in the District Court of Appeal, arguing that it was not liable for the payment of compensation

benefits to the applicant for various reasons, as well as that it was not liable for the lien claim of the Veterans Administration. Such petition was denied without opinion on August 22, 1958.

Petitioner then filed a Petition for Hearing in the Supreme Court of the State of California, again arguing that it was not liable to the applicant for various reasons as well as that it was not liable for the lien claim. Such petition was denied without opinion on October 15, 1958.

Petitioner has now accepted the fact that it is liable to the applicant for all benefits except the cost of the medical treatment and hospital care furnished to the applicant by the Veterans Administration, and the only question involved in this Petition for Writ of Certiorari concerns the lien claim of the Veterans Administration.

ARGUMENT

California Labor Code, Section 4600 provides essentially that the employer (which includes the insurer) is liable for the reasonable expense incurred by or *on behalf of* the employee in providing medical and hospital treatment where the employer refuses to do so.

California Labor Code, Section 4903 permits a lien for the reasonable expense for medical and hospital treatment incurred by or *on behalf of* the injured employee.

The wording of these code sections makes it clear that it is not necessary that the injured employee incur any expense; it is sufficient if expense is incurred

on his behalf. The lien claimant's right to reimbursement is direct, not derivative. There is no question in the instant case but that the Veterans Administration incurred expense on behalf of the injured employee, to be exact, the amount of its lien.

In the case of *United States* v. *Saint Paul Mercury Indemnity Co.*, 238 Fed. 2d 594, cited and relied upon by the Petitioner, the veteran, having contracted poliomyelitis, was admitted to a Veterans Administration Hospital. He carried "poliomyelitis expense policy" insurance under which the insurer agreed to pay him "for expenses *actually incurred by the insured*" not exceeding the aggregate sum of $5,000, if he were stricken with poliomyelitis. (Emphasis added.)

The Veterans Administration billed the insurer from time to time. The insurer refused to pay on the ground that there was no "expense actually incurred by the insured" since the insured had qualified for free care under the appropriate Federal statutes. The Eighth U. S. Circuit Court of Appeals upheld the insurer's contention on the ground that since the veteran was entitled to free care no expense had been incurred "by him."

The basis of the *St. Paul* case is that the insurance policy covered only expense "actually incurred" and since the veteran had not "actually incurred" any expense the Veterans Administration could not require the insurer to pay the cost of hospitalization.

In the instant case, the question of whether the employee-veteran himself actually incurred any ex-

pense is not relevant. Expense was incurred by the lien claimant *on his behalf*, which is all that is necessary to qualify under the California statutes.

The *St. Paul* case is therefore not in point.

Petitioner also cites and relies on *U. S.* v. *Standard Oil Company*, 332 U. S. 301, 91 L. Ed. 2067, 67 S. Ct. 1604. In that case a soldier was injured by a third party tort feasor. The United States filed suit to recover from the third party the amount it had expended for hospitalization and for soldier's pay while the soldier was unfit for duty. The court pointed out, at page 305, that "Perhaps no relation between the government and a citizen is more distinctly federal in character than that between it and members of its armed forces. * * * the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority." It held that whether the United States should be reimbursed was a matter of federal fiscal policy determinable by Congress, which alone may create a right of action to recover damages from the wrongdoer.

The applicant herein is not a soldier but a veteran. His only rights are those of a veteran long out of service. The rationale of the *Standard Oil Company* case therefore does not apply to him.

The distinction in the relationship between soldier and veteran is pointed up in the cases of *Feres* v. *United States*, 340 U.S. 135, 71 S. Ct. 153 and *United States* v. *Brown*, 348 U.S. 110, 75 S. Ct. 141. There

were three cases considered in one opinion in the *Feres* decision. In one of the cases, the *Jefferson* case, a soldier suffered injury through the malpractice of an army surgeon. The Court held that the United States was not liable under the Tort Claims Act for this injury because of the nature of the relationship between persons in service and the government. In the *Brown* case, a veteran, who was receiving medical treatment in a Veterans Administration Hospital for an injury sustained while on active duty in the armed services, was injured through the malpractice of the hospital personnel. The Court pointed out that the injury occurred after his discharge while he enjoyed a civilian status. It held that the United States was liable under the Tort Claims Act for this malpractice since the injury was not incident to nor did it arise out of or in the course of military service.

In addition, the regulations of the Veterans Administration provide, in effect, that veterans hospitalized for non-service connected disabilities "will not be furnished hospital treatment without charge therefor to the extent of the amount for which third parties are or will become liable." The regulations specifically provide for reimbursement for cost of hospital care or medical or surgical treatment by reason of statutory or contractual relationship, including workmen's compensation. (38 CFR 17.48 (d), Appendix F of Petitioner's Brief, p. xiii.)

As the Court in *United States* v. *St. Paul Mercury Indemnity Co.*, 133 Fed. Sup. 726 (the opinion of the

district court in the *St. Paul* case), pointed out, the regulations promulgated by the Administrator of Veterans Affairs within the authority of 38 U. S. C. 706 (Appendix D of Petitioner's Brief, p. xi) have the effect of law. The *St. Paul* case, supra, affirmed this reasoning on appeal, at page 598. (See also 38 U. S. C. 11a, now 38 U. S. C. 2210.)

In the *Standard Oil* case, supra, the Court held that Congress alone might create a right of action in the Federal Government to recover damages from the wrongdoer. Here, Congress has created such a right in that it delegated the power to make appropriate rules and regulations to the Veterans Administrator. The regulations of the Veterans Administrator authorize recovery in cases such as the instant one.

It is submitted that the *Standard Oil Co.* case, supra, is authority for the position taken by the commission rather than that taken by the petitioner.

In *United States* v. *Gilman*, 347 U. S. 507, 74 S. Ct. 695, 98 L. Ed. 898, cited by petitioner, the single question was whether the United States might recover indemnity from one of its employees after it had been held liable under the Federal Tort Claims Act for the negligence of the employee. The court held that the United States might not recover such indemnity in the absence of congressional action authorizing such recovery.

Once again this case is not in point since Congress has authorized recovery in a situation such as is presented in the instant case.

Petitioner cites *United States* v. *Harleysville Mut. Cas. Co.*, 150 Fed. Sup. 326. In this case, a veteran who had reenlisted was injured in an automobile accident. He was treated in a Veterans Administration Hospital. The Veterans Administration attempted to recover the expense of his hospitalization from the Army, without success. The patient settled his case with the insurer of the third party tort feasor without payment to the Veterans Administration, in spite of a lien which had been filed by the latter.

The court said at page 333:

> "In the instant case the veteran refused to execute an assignment. Thus any claim of right to proceed against the insurer based on the regulation of the Veterans Administration must fail."

Whether or not the District Court's conclusion was correct, because the veteran refused to execute an assignment the judge treated the case as if there were no applicable federal regulation and relied upon the reasoning in the *Standard Oil Company* and *Gilman* cases, supra.

In our case, the employee-veteran executed an assignment.

The *Harleysville Mut. Cas. Co.* case is not in point.

The Petitioner stated in its statement on jurisdiction that "There is conflict within this State, as well as interstate conflict, in regard to whether or not the Federal Laws permit a Veterans Administration Hospital to make claim against a veteran or a Workmen's Compensation carrier for hospital and medical treatment."

As far as we know, the Industrial Accident Commission of the State of California has never made a contrary decision on this question. The case referred to by petitioner was decided by an individual referee and none of the parties petitioned for reconsideration by the commission. Therefore the question was not presented to the commission.

Respondent commission has found only one case of record concerning the right of the Veterans Administration to file a claim against a workmen's compensation insurer for hospital and medical treatment given a veteran. The decision in that case is in complete accord with the decision made herein.

In the case of *Higley* v. *Schlessman*, (Oklahoma, 1956), 292 P. 2d 411, the Supreme Court of the State of Oklahoma referred to the Veterans Administration regulations authorized by Federal statute, which gave the Administrator of Veterans Affairs the authority to furnish hospital and medical care and to make a reasonable charge therefor in workmen's compensation cases such as the present case. The court held that the Administrator had a right to have his claim for such services in a reasonable amount allowed by the State Industrial Commission to the same extent as any other private hospital or physician. This case was decided subsequent to the *St. Paul* case and the U. S. Supreme Court decisions relied upon by Petitioner.

Petitioner is attempting to take advantage of its own wrong. It is bound under the law to provide medi-

cal and hospital treatment to an injured employee. After refusing to obey the law, it now maintains that since the injured employee was a veteran and thus could be admitted to a Veterans Administration Hospital, that it should not be required to reimburse the Hospital. It apparently feels that the taxpayers should pay the cost of treatment, although it is in the business of accepting premiums from employers to pay for the costs of injuries to their employees.

If the lien of the Veterans Hospital were not allowed, it would follow that some insurance companies would routinely refuse medical and hospital treatment to any injured workman who happened to be a veteran.

If the lien were not allowed in this case, then it would follow that the reimbursement provisions of the Veterans Regulations are, for all practical purposes, of no force and effect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California.
January 30, 1959

Respectfully submitted,

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